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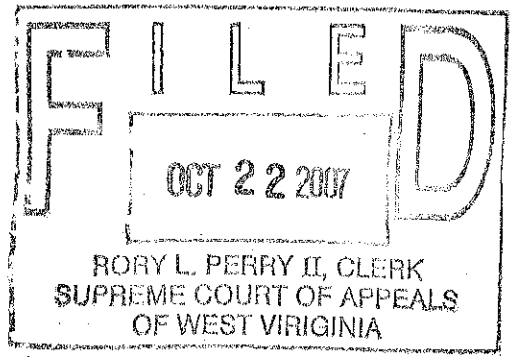
NO. 33453

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

HAROLD LEE CYRUS

Appellant,

APPELLANT'S REPLY TO BRIEF OF APPELLEE

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NOW COMES your Appellant, Harold Lee Cyrus, by counsel and hereby makes the following reply to the State of West Virginia. By way of reply Appellant states that the States argument is utterly without merit and should be denied.

I.

Shannon Beck, Crystal Leedy, and Shirley Aycoth were expert witnesses. Testified as experts and the state was required to comply with Rule 16 and make proper disclosure.

The State argues that Shannon Beck, Crystal Leedy and Shirley Aycoth were called as fact witness and hence the disclosure requirements of Rule 16 did not apply. In advancing this argument, the State accuses appellant of "pretending," and being disingenuous. Appellant responds that it is the State which is playing pretend by engaging in the same sort of shell game behavior that gives rise to this appeal. In the words of the old Scotch Law, and party does not get

to approbate and reprobate at the same time in the same litigation. See *Dairyland Ins. Co. v. Hughs*, 317 F. Supp 98 (1970).

When a party does assume inconsistent positions in the course of the same legal proceedings and both approbates and reprobates, they generally run into an estoppel preventing them from asserting inconsistent positions. As this court noted in *Haba v. Be Arm Band Grill*, 458 S.E. 2d 915 (W.Va. 1996 at Syllabus Pt. 3

> - - - Parties will not be permitted to assume successive inconsistent positions in the course of a suit or a series of suits in reference to the same fact or state of facts.

This is true in both criminal and civil proceedings. See *Commonwealth v. Beavers*, 142 S.E. 402 (Va. 1928)

In the instant matter at trial, the State represented that these individuals were experts. In short, Ms. Garton called them experts and represented the same to the trial court, god, and man. The record discloses at pages 200 and 201of the trial transcripts:

Mr. Smith: Your Honor, before the trial started we discussed the fact that under **Rule 16** the State has to disclose experts and furnish the Court some summaries, and I'm worried about whether or not their gonna try to present expert testimony through these counselors regarding recantations that they're getting ready to call, and if so none of that was disclosed nor were these counselors properly disclosed as expert witnesses and we would object to any such testimony.

The Court: Ms Garton?

MS. Garton: Your Honor, that's always part and parcel of the - - the whole process, they know when these children come in that they have recanted they have to deal with that, they have to see if the children are on the level with them. We didn't have anyone coming in from outside, but the experts that - - that's why we **call 'em experts**, he said we didn't disclose an **expert**, we told him Shannon Beck was coming in from the get go she's this child's counselor.

Then again at page 203 of the Trial Transcript Ms. Garton revisit the point and represented:

MS. Garton: Well sure it is, Your Honor, but this is corroboration and it's through her counselor and it's a medical thing.

Indeed, based on all that transpired the trial court gave a expert witness instruction.

Moreover, the record reflects that these witnesses were qualified experts. For example at page 297 of the Trial Transcript Shannon Beck testified:

A. I worked with the Children's Home Society of West Virginia and I was considered a foster care social worker and I provided foster care services, case management, and therapy services.

Q. Okay, and what is your educational background?

A. I have a Masters Degree in Social Work, and I worked ten years in the field of Child Welfare.

Q. Okay ten years in what capacity, I - - -

A. Providing therapy, - -

Q. - - I'm assuming it's different ones.

A. - - case management, supervisor, visitation, all sorts of things.

Q. Okay was that all with the Department of Health and Human Resources?

A. Yeah, most of my cases that I worked with were child abuse cases and they were referred from the Department of Health and Human Resources.

Q. Okay. When you say they were referred by the Department was that ten years of experience you've had with the Children's Home Society?

A. Yes ma'am.

Ms. Beck then proceeded to testify as an expert. As an example thereof, the following was said at page 304 of the Trial Transcript;

A. Well 70 to 90 percent of children are sexually abused by someone they know, and what that means is if you are sexually abused by someone who is suppose to - - a father figure, I mean he was her stepfather but he was a - - he was the father to her. This is a person who's supposed to be your protector, right, you - - no matter what you are able to come home and mom and dad take care of everything, they know best, they are the teachers, they - - and they know right from wrong, and when you've been violated by someone that close to you, you still care about them, it's still my father. It's kinda like you can be beaten by your dad, maybe, when you're growin' up but when goes to pass away are still gonna grieve that he passed away? Yeah, because we love our - - we love our mother we love our fathers no matter what if they did such a bad thing to us.

At page 307 and 308 of the trial transcript the foregoing expert testimony which was related to the recantation issue:

A. - - no, no it's not a cure and she will live with this for the rest of her life. Will she - - can she grow up and live a productive life and have healthy relationships, sure, you know but did this impact her, yes, it did impact her and with boundaries, you know understanding boundaries, healthy relationships, unhealthy, relationships, sex. love, what's the different - - different types of love, so sure, and these are things that in my therapy we had to work through. I provided her a safe environment for her to be able to come to, to talk about things with that experience, what happened to her, the images, the trauma, whatever, I provided her a safe environment so that she can talk

about those things, process her thoughts and feelings about that, move her to a point where she's able to cope with what happened and - - and, also, educate, did a lot of education about abuse of a - - of a - - that child sexual abuse, what are boundaries, what is personal space, safe secrets, unsafe secrets, like we had different activities that I - - we would do together.

Q. When she first began counseling with you did she tell you everything?

A. No.

Then at page 308;

A. Well I guess the best example that maybe I can give to help you relate to that , is that if you were to ask any of us in this courtroom, were asked to come up here and sit where I'm sitting right now and give in detail your last sexual experience how would you feel, to strangers, to someone you don't know, very uncomfortable; do you think you might, probably, leave out a detail or two, you know, so that's the best thing I can compare that to is her, you know, telling her - - and this happened over years, it wasn't two, we're talking years, so you can't expect a - - an adult to come, and especially and a child, to sit and be able to tell the whole story, everything that 's happened and get it just right. Does that mean it didn't happen because you didn't get it right, you didn't get your sexual experience detailed out right, did that happened, so the same with - -

Q. So she probably still hasn't told you everything?

A. I'm sure not, hum-hum.

None of this was disclosed by way of Rule 16 expert witness disclosure. Indeed, defense counsel was told not to expect expert testimony. At page 10 of the Pre-trial status hearing, the Prosecuting Attorney led counsel not to expect any such expert testimony to compound the error.

Mr. Boggess: **Yeah, I'm not aware of any experts that have been mentioned in - - in regard to this, they would have - - been some recantations by the victims but - -**

Mr. Boggess: **- - but other than that I think it's gonna be testimony primarily from the victims, and so on and so forth, and that of people that the Defense is familiar with, but again - -**

Appellant argues that he is entitled to a reversal of his conviction because he was prejudiced by the states failure to abide by the provisions of Rule 16 of The West Virginia Rules of Criminal Procedure. Pursuant to Rule 16, the defendant was entitled to know the identity of the expert, to have a summary of their experts testimony, which describes their opinions, the basis for them, and the witnesses qualification.

It is undisputed that the defendant received none of this. Instead the state chose to rely on an open file policy that, as this case demonstrates only opens so far. This purported open file policy is and of itself is not legally sufficient to meet the discovery requirements of the Rules Of Criminal Procedure. See *Lawyers Disciplinary Board v. Hatcher*, 483 S.E. 2d 810 (W.Va. 1997)

Rather the standard to be applied is one of prejudice. Appellant to prevail must demonstrate prejudice amounting to surprise and/or a non-disclosure which hinders the preparation and presentation of the defense. See *State v. Grimm*, 270 S.E. 2d 173 (W.Va. 1980) *State ex rel Rusen v. Hill*, 454 S.E. 2d 427 (W.Va. 1994)

In the case at bar, Appellant respectfully submits that being hit with three (3) experts the day of trial after being told there would be no experts mere days before trial prejudiced his ability to meet this evidence, including but not limited to seeking his own experts, preparation for trial, and fishing expedition for cross examination. The prejudice is obvious and manifest.

Counsel would note for the record that should the State be accurate that Beck, Leedy, and Aycoth were not experts, then this conviction is even now more deeply flawed and the testimony as to the child's statements are pure hearsay, and the evidence of treatment is wholly inadmissable. At page 203 of the Trial Transcript counsel also preserved this point of error;

Mr. Smith: Your Honor, I don't think any of that is proper expert testimony under the case law, if they're gonna present expert testimony it has to go to things like child abuse syndromes and et cetera, et cetera, and just to show the child had counseling we thing is highly prejudicial unless you can link it up to - -

The Court: I will take that under advisement. Are you ready to call your next witness?

Ms. GARTON: Yes sir.

Counsel would also note for the record that the trial was replete with testimony that no physical findings of sexual abuse are common. Appellant challenges the truthfulness of this testimony and had experts been properly disclosed would have had hearing on the same challenging it's veracity.

Counsel has been trying to discover a bases for this one for years, and to date no studies

have been produced.

In Mercer County *State v. Wert*, (Indictment # 02-F-339) Dr. Gregory Wallace testimony revealed it's based on a deeply flawed study with a limited sample which was not segregate by the type of abuse alleged, whether simple , or as in the instant case, "raped in every room in the house". In ***Wert*** Dr. Wallace could not name the study, and said 66% did not show signs. In Mercer County in *State v. Thompson*, (Indictment # 03-F-302-S) Dr. Wallace testified 70% did not show signs. In Mercer County in *State v. White*, (Indictment # 01-F-30-F) Dr. Wallace testified that 85% - 95% did not show any physical signs..

Appellant could argue that none of this should be admissible as it's apparent accuracy is nil and its prejudicial effect great. This testimony should be excluded pursuant to Rule 403 of the West Virginia Rules of Evidence, and had proper disclosure been made, it would have been properly challenged for this courts mature consideration.

WHEREFORE, Appellant Harold Lee Cyrus, prays that this Honorable Court would reverse his convictions and award him a new trial.

II.

The Trial Court Erred in not holding Pre-trial Hearings, (after disclosure by the State that there was none), on other crimes, wrongs, or acts, for which the Appellant was not indicted in violation of Rule 404 of the West Virginia Rules of Evidence.

Appellant Harold Lee Cyrus, next argues that the trial court erred in not holding hearings and admitting into evidence, other crimes, wrongs, or acts for which the Appellant was not indicted in violation of Rule 404 of the West Virginia Rules of Evidence.

This other crime or wrong evidence falls into two broad categories. First, there is the evidence of alleged molestation, beatings, etc. in McDowell County. The Second, there is the evidence of child abuse and neglect proceeding which came into evidence over defense counsel objection.

A. Alleged Molestation and Beating in McDowell County

Most of the evidence presented of beatings and molestation regarding V.C. allegedly occurred in McDowell County. V. C. testified only two, three or four alleged incidents occurred in Mercer County (T.R. 166). The jury thereafter acquitted Appellant on the charges of misconduct in Mercer County.

Appellant argues that the presentation of this evidence was error, which was compounded by the lack of a hearing on the same and reasonable notice that the state intended to use the same. Had the dictates of the rule been followed then the D.H.H.R. records from McDowell County could have been sought. It is and has always been appellants position that V.C. was removed from the home in McDowell because of a serve spanking she got for attempting the harm a new born infant in the home (T.R. 400 - 401). These records would have told the truth concerning this incident.

Q. Did you have some problems with the Department of Health and Human Services in McDowell County?

A. Yes I did.

Q. What happened?

A. They were the incidents of one of the children named Victoria Cyrus.

Q. Okay, Victoria, you heard her testify, okay?

A. Yes, my wife just had a newborn, it was - -

Q. Who was that?

A. - - that was Emmit - - I mean not Emmit, excuse me, it was Walter Lee.

Q. Okay?

A. He'd been restless since he was a week old, she'd been sassin' the - - the stepmother, my wife by the way, Victoria had been, and she done somethin' toward her and said something and she all at once just kicked at the baby to kick the arm of the baby out of her arms and states, this is not my brother.

Q. And then what happened?

A. Well I got mad, I did, I got really hot because I thought she really hurt the baby really bad, my other son walked - - Emmit, he actually caught the baby in his arms right before he hit the floor, and Victoria got a little mad about that, too, but there weren't a lot about it she just got hateful about it, and I took Victoria outside, you can see the picture, No. 1, there's a porch to the right of that house and you see a porch there, there's a opening right there and there's a yard right there, I whipped here right there with my hand and then I did, I got mad and got a switch and I whipped here back and it did make a mark on her, I didn't realize I hit her that hard and I did apologize to her, well then it was over and there was nothin' more said. Well I had to go somewhere that evenin', or something, the next minute I cam back home Department and Human Services had already came in and took Victoria out of the home and I didn't even know it.

Q. So you admit that you did get a little rough with Victoria?

A. Yes I did.

It is also noteworthy that the alleged molestation in McDowell County regarding V.C. occurred months, if not years before an alleged crime was perpetrated on K.S.

K.S. alleged one incident in McDowell County with the remainder in Mercer County. (T.R. 215 - 217). During this incident K.S. alleged digital penetration. It was also this incident

that K.S. testified that she was whipped for and threatened about lying. This whipping and threatening was not done by Appellant, but by K.S. mother, and as described by the witness was not instigated by Appellant who looked on (T.R. 217).

Appellant argues that this evidence was improper because it does nothing to explain the crime charged, and its breadth was not limited to that which was necessary to accomplish some purpose because he did not commit the beating or threaten the child. See *State v. Spicer*, 245 S.E. 2d 922 (W.Va. 1978) It had no probate value.

Moreover this allegedly happened at least a year or two before the incident alleged in Mercer County. Res Gestae is defined by Blacks Law Dictionary as being;

> "The Latin expression 'res gestae' or 'res gesta,' literally 'things done' or 'thing transacted,' has long served as a catchword....[T]he phrase has frequently served both to let in utterances which in strictness were not admissible and to exclude utterances which might well have been admitted. And frequently also its indefiniteness has served as a basis for rulings where it was easier for the judge to invoke this imposing catchword than to think through the real question involved. The phrase is antiquated. By modern judges it is being gradually discarded. It is superfluous, and serves only to obscure the logic of the rules. It should be left to oblivion." John H. Wigmore. *A Students' Textbook of the Law of Evidence* 279 (1935)

> "The res gestae embraces not only the actual facts of the transaction and the circumstances surrounding it, but the matters immediately antecedent to and having a direct causal connection with it, as well as acts immediately following it and so closely connected with it as to form in reality a part of the occurrence. *State v. Fouquette,* 221 P. 2d 404, 416-17 (Nev. 1950)

These incidents were to remote in time as to be Res Gestae. Further, as he did not commit them, these matters should not have been admitted against him.

K.S. testified to one other threat of violence, which was wholly unrelated to the crimes charged, K.S. stated at page 224 of the record;

A. It was on Power House Hill when I seen them.

Q. Okay do you remember any specific times when you came to see them?

A. It was a night after I had got home from church because it - - you know, we went to church that night and then I got home and I had got in trouble for somethin' and they - - I was told that if I didn't straighten up I was gonna get the same thing Victoria got, and I was told to go to the bathroom and let her show me what she got.

Q. Did you?

A. Yes I seen exactly what she got.

Q. What was it?

A. She had switch whelps all the way down her legs.

In fact K.S. testified she was never beaten or switched (R 225). Appellant argues as this was in no way connected to the crimes charged that this was prejudical error and would have been excluded had the necessary pretrial procedure been followed.

Q. Okay did - - did you ever get beaten with a switch?

A. No.

These incidents in McDowell explained nothing about K.S. because most it not all of her complaints arose in Mercer County. This evidence was easily distinguished and could have been easily segregated by county line.

Moreover, the incident involving V.C. should have been excluded as to K.S. allegations because K.S. could not relate them to her allegations. K.S. testified at page 221;

Q. Okay do you remember talking to Victoria about what was happening to you with the Defendant?

A. No I do not.

Q. You don't remember it. You don't remember telling her or her telling you?

A. No I do not.

Q. Do you remember ever seeing her be harmed in house No. 1?

A. No.

Q. Okay, do you remember seeing her be harmed in house No. 2?

A. No.

Q. Did you ever see Victoria - -

A. I have seen where she was practically, you could say, beaten.

Q. Okay but - - but that - - but harmed that way, physically harmed, but you never saw the Defendant with her?

A. No.

Q. Okay. Do you know if she - - did you ever see her witness anything involving you?

A. No.

Q. So if she did you don't know about it, you didn't know that she saw anything with you?

A. I do not know if she saw anything with me.

Q. Okay. Kimberly, are you saying you flat out never told Victoria anything or you just

don't remember today having told her anything?

A. I have - - I do not remember tellin' her ever that anything was actually goin' on like that.

Here Appellant argues that V.C.'s testimony was wholly immaterial to K.S allegations and should not have been admitted against Appellant as it relates to the actual counts of his conviction. Had the state made the necessary disclosures and had the required pre-trial hearings, then in all likelihood these two cases could have been servered one for another. Instead of playing by the rules the state opted for an ambush which is now the subject of this appeal.

B. Evidence Of Abused Neglect Proceedings

Appellant also cites as error the jury being told that he had been adjudicated a abuser in abuse and neglect proceedings and his parental rights had been terminated.

This evidence had no probative values, was highly prejudicial and really explained nothing. Rather it improperly invaded the province of the jury by telling them the Judge had already found appellant guilty, and intimating to them that they were there to rubber stamp this determination. The trial court was concerned about this very issue, and attempted to give the state guidance on same. (R. 331)

MS. GARTON: The whole - - the whole - - every bit of questioning he's asked - - I don't know why you're goin' uh-huh - - has been because they have said that she recanted under oath before this Court, it's been opened, she did recant and I was going to ask Ms. Leedy if she was present if she recanted, but if she then admitted to Ms. Leedy afterwards why she recanted and that she had, that's central to the whole case.

THE COURT: You can do that but don't get into the termi - - whether the rights were terminated, - -

MS. GARTON: Oh I wasn't, - -

THE COURT: - - - or whether the Court made a finding of termination.

MS. GARTON: - - I wasn't about to ask her, my next question was gonna - - were you gonna be pres - - present.

THE COURT: Okay, again I think you need to stay away from that, but - -

MS. GARTON: Okay.

MR. SMITH: And note my objection to her testifyin' as to any hearsay after the proceeding?

The State in their brief admits a misstep in these regards and attempts to minimize their wrongful conduct. The state says in their brief, at page 11

> .. . Unfortunately, when counsel asked Ms. Leeds (Leedy ?) the question, she inadvertently referred to a "termination proceeding" (Id. At 332) Not only did the defense not object to counsel's mistake, Ms. Leeds (Leedy ?) Actually corrected her and stated that KS had recanted in an "adjudication" proceeding, not a "termination" proceeding. (Id.) Following the one misstep, the State did not again discuss a "termination" proceeding, and the jury was never notified whether anyone's parental rights had ever been terminated.

This is a misrepresentation of what actually occurred. The state was hot on this topic from the get go and was hot on it until the trial court finally attempted to give them good (guidance) at page 331, as to the possibility of serious error. At page 299 during the testimony of Shannon Beck the following occurred;

Q. Okay now - - and that's - - the last resort, terminating someone's parental rights is absolutely the last resort, okay, so she's removed from the home and placed in foster care and then you are responsible for identifying her needs, and what - - and at that time she still has contact with her mother and her - - and when she's in foster care part of that time she's with her siblings?

A. Yeah, hum - hum.

Q. Okay when you're identifying her needs and you look at Kimberly Stevenson what did you see that she needed?

MR. SMITH: Your Honor, I'm gonna object at this time based upon the prior - - prior matters placed before the Court?

THE COURT: The objection's overruled you may proceed.

MR. SMITH: May I have a continuing objection, Your Honor, so I won't have to - -

THE COURT: Certainly, certainly.

MR. SMITH: - - keep interrupting. Thank you.

At Page 301 of the Trial Transcript again during the testimony of Shannon Beck the state

made the following "misstep";

Q. Okay, so the idea was before you arranged this you would first talk to the mother to get a feel for it, basically?

A. Right because this was separate, I had done individual therapy, we got to a point where she really wanted to talk with mom about what happened and I didn't want this to be a negative experience for her, she'd already been through enough and so I met with her mother and to talk to her about what had happened, that he had been adjudicated of abuse and neglect, what he - -

MR. SMITH. I'm gonna object to that, too, Your Honor.

THE COURT: Again sustained, the jury - - the jury will not - - not consider that and let's - - let's try to get right on to the issue of credibility here.

At page 309 of the Trial Transcript and also during the testimony of Sharon Beck the state had another "misstep".

Q. During the time that you were her case manager and she was in foster car, did you learn - - now this was back when she was visiting with her mom before the parental rights were terminated, did you learn as the case manager that there being I don't won't to say illegal but forbidden communications?

A. Yes.

Hence, Appellant argues that the proceedings and there results were a recurrent theme of the State during the trial, and the misconduct was far from inadvertent. In fact, by the time the Judge stepped in to limit the testimony the jury had already been told that Appellant had been adjudicated an abuser, and his parental rights terminated by the prosecutor over the appellant's objection.

Appellant argues that not only is the submission for this evidence highly prejudice and without probate value because it violates rule 403 of the West Virginia Rules of Evidence, it is also irrelevant and immaterial to the issue joined because of different levels of proof. Indeed, given the manner in which the prosecutor slipped it before the jury in her improper leading questions, it could well constitute unsworn testimony being plead before the jury.

Consequently Appellant says that this is reversible error and that his conviction should be overturned because of it.

WHEREFORE, Appellant Harold Lee Cyrus prays that this Honorable Court would reverse his convictions and award him a new trial.

The foregoing is submitted to this Honorable Court for due and fair consideration. Thank you.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, David C. Smith, of counsel for the Defendant, do hereby certify that I served a true and correct copy of the foregoing "**APPELLANT'S REPLY TO BRIEF OF APPELLEE**" upon Deborah K. Garton, Assistant Prosecuting Attorney, by mailing same to him, United States mail, postage prepaid to the Mercer County Courthouse Annex, 120 Scott Street, Suite 200; Princeton, WV 24740.

This the 19th day of October, 2007.

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